IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.874 OF 2006.

Sambhaji Sakharam Dhaigude & ors. ... Appellants.

Versus.

Ramchandra Krishna Dhaigude. ... Respondent.

Shri Uday Warunjikar for the Appellant.

Shri Umesh Mankapure for the Respondent.

CORAM : ABHAY S.OKA, J.

DATED : 6th July, 2007.

P.C.:

1. Heard Shri Warunjikar for the Appellant and Shri Mankapure for the Respondent. The Appellants are the original Plaintiffs. The Appellants filed a suit simplicitor for injunction claiming to be the owners in respect of the property bearing Gat No.98, 313 and 318, more particularly described in the plaint, situated at village Akole and Walsewari, Taluka Indapur, District Pune. The trial Court decreed the suit and granted a perpetual injunction against the Respondent-Defendant. In the appeal preferred by the Respondent before the District Court the decree passed by the trial Court has been set aside and the suit has been dismissed.

2. Shri Warunjikar appearing for the Appellant submitted that the following substantial questions of law arise in the matter:

(i) Whether the Appellate Court could have

relied upon the agreement dated 23rd July 1986 though original of the said agreement was not produced and proved in accordance with law?

(ii) Though the Respondent had made a clear statement that he was no way concerned with the land bearing Block No.313 and 318, whether the Appellate Court was justified in setting aside the decree passed in respect of the said property?

Considering the controversy involved in the matter, I have heard the Second Appeal at the admission stage as the aforesaid substantial questions of law arise in the Appeal. At the outset, Shri Mankapure appearing for the Respondent stated that the Respondent is not claiming any right, title or interest in respect of the land bearing block No.313 and 318. He, therefore, submitted that this Court may pass appropriate order in respect of the said two portions of the land.

3. The learned Advocate for the Appellant invited my attention to the finding recorded by the Appellate Court in paragraph 18 of the Judgment. He submitted that the original agreement dated 23rd July 1986 was not produced. He submitted that the alleged agreement dated

23rd July 1986 will not create any interest in favour of the Respondent as the said agreement is contrary to what is provided in the consolidation scheme. He submitted that on the basis of the said alleged agreement, the Appellate Court could not have set aside the decree passed in respect of the land bearing Block No.92. The learned Counsel for the Respondent supported the impugned Judgment and decree by pointing out the findings recorded by the Appellate Court.

4. The Appellate Court has referred to the evidence of the witness examined in Appeal on behalf of the Respondent. The said witness was examined for proving the alleged agreement dated 23rd July 1986. The finding recorded in paragraph 20 shows that the execution of the said agreement by the Appellants was duly proved. The Appellate Court observed that except for mere denial, the Appellants have not explained as to how the signatures of the Appellant Nos.1, 2 and 4 appear on the agreement and as to how a thumb impression of the Appellant No.3 appears on the said Agreement. The learned Judge has referred to the contents of the agreement in which the Appellants admitted that the Respondent was in possession of the land bearing Block No.98 for years together and they were ready and willing to give up their right in respect of the said portion of the land. On the basis of the said agreement, the

Appellate Court recorded a finding that the Appellants have not established their exclusive possession of the land bearing block No.98. In view of the finding of fact recorded by the Appellate Court on the basis of the oral and documentary evidence on record, no interference can be made with that part of the decree by which the Appeal was dismissed as regards block No.98.

5. In so far as the said two portions of the land are concerned, it is obvious that the Appellate Court has committed an error by dismissing the suit.

6. Hence the Appeal succeeds in part and the following order is passed:

(i) The impugned judgment and decree dated 20th July 2006 is quashed and set aside and the judgment and decree dated 27th November 2001 passed by the trial Court is restored only so far as it relates to the land bearing block Nos.313 and 318. It is made clear that the suit stands dismissed in respect of land bearing block No.98.

(ii) Parties to bear their respective costs.

(iii) The Second Appeal is partly allowed in the above terms.

Judge.